The Consultation Process

Consultation

- Defined in laws, amendments, executive orders, etc.
- Origins in tribal sovereignty as acknowledged in U.S. Constitution
- Government-to-government
- An process – **Not A Event**
- Exchange of views
- May or may not involve agreement

Consultation - The Process

- What is Consultation?
  - The word implies a conference, a discussion, an exchange between two or more people or parties
  - It is not simply notification
  - It is not simply reporting information
  - Each Tribe has their own view of what constitutes consultation

Activities that may result in consultation

- Construction projects
- Public work projects
- Environmental restoration projects
- Military ground forces training
- Military aircraft training

Activities that may result in consultation

- Protection of natural resources, archeological and sacred sites, and tradition use areas on
  - Current military installations
  - DoD training areas
  - Formerly Used Defense Sites (FUDS)

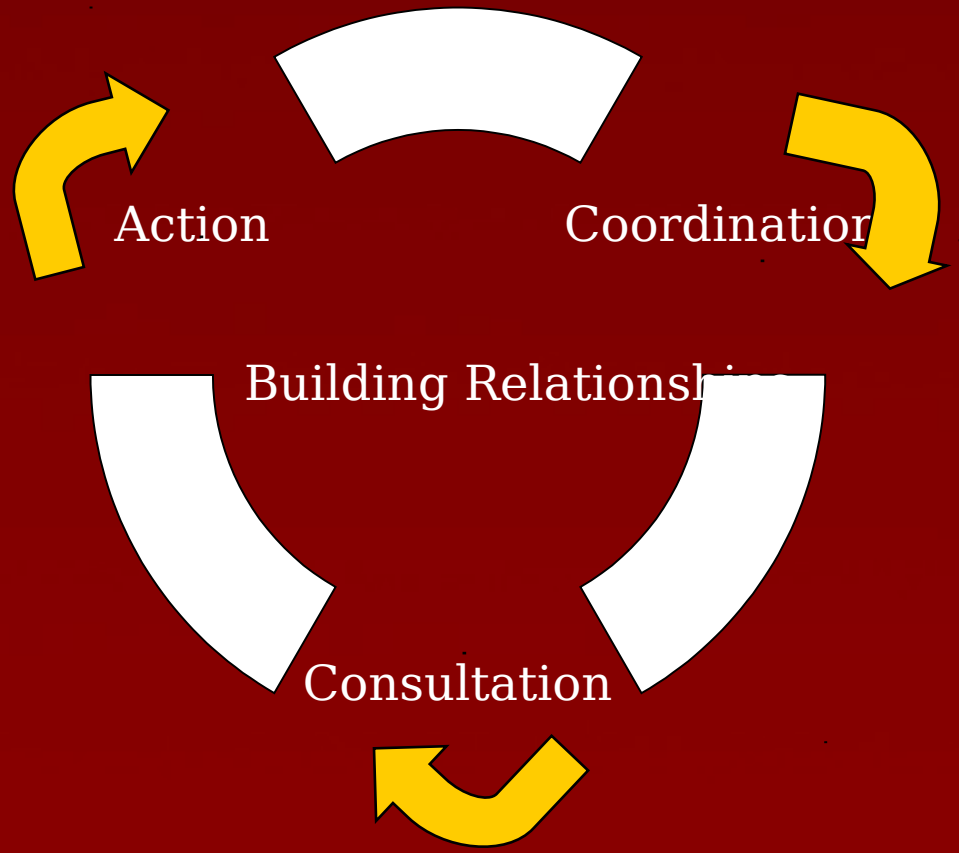
Activities that may result in consultation

- Drafting:
  - Integrated Natural Resource Management Plans
  - Integrated Cultural Resource Management Plans
  - River System Annual Operations Plans

Consultation - DoD Decision

- Through its Policy and Instruction, DoD made a fundamental decision to partner with tribes on decisions related to tribes' concerns and issues
  - Prioritize those cultural and natural resources needing protection
  - Select best management practices
  - Long-range planning and monitoring

Consultation Process



Government-to-Government Consultation

- May involve high level of formality
- Meeting of two heads of government or their appointed representatives
- Occurs when there is mutual agreement that consultation is taking place
- Critical elements – **Start Talking Early, Talk Often, Be Open and Honest**

Government-to-Government Consultation, continued

- Consultation must be initiated at a government-to-government level with each tribe (Be prepared to address the perception of the “divide and conquer” approach)
- Once established, federal agencies may use tribal consortia to exchange information (Keep open a offer to consult individually as needed)
- Only tribes may authorize use of tribal consortia for consultation
- Tribal consortia may *not* be used for initial consultation

Frances Cussen (left), representing the Caddo Nation of Oklahoma, and Brig. Gen. Charles H. Swannack Jr., commander of the Joint Readiness Training Center and Fort Polk, sign a comprehensive agreement for the Native American Graves Protection and Repatriation Act at Fort Polk Nov. 3. The middle flag behind them is the Caddo flag.

Frances Cussen, Caddo Nation Tribal Council, and Brig. General Charles Swannack, Jr., Fort Polk, signed a comprehensive NAGPRA agreement

Government-to-Government Coordination

- Could occur at a leadership or staff level
- Critical element of maintaining on-going dialogue
- Coordinate to set up processes and ground rules
- Could help facilitate legal notification
- Effective coordination allow us to “talk early, talk often”

Informal Consultation

- On-going dialogue between the staff of two governments
- Exchange of information and opinions
- Can be in person, by phone or by mail
- Informational meetings that are not issue or event driven

Informal Consultation

- The head of a tribal government and an installation commander, may delegate to their staff development of a mutually agreed upon consultation process and procedures to maintain an ongoing relationship
- Critical element of maintaining an ongoing dialogue: “talk early, talk often, be open and honest”

Differing Expectations

As you define your installation's goals in consultation and as you prepare for consultation, keep in mind differences in expectations

Installation View of Consultation

Common view of consultation purpose

- Meet with tribes and indicate agency has listened
- Focus on techniques and details used
- Be friendly and show concern

Tribal View of Consultation

What's important to tribes

- *Exchange* of views and ideas
- Listening
- Meaningful input in final decisions and plans
- Achieve mutual understanding

Consultation Steps

1. Prepare planning document
2. Determine consulting partners
3. Make contact with consulting partners
4. Arrange for consultation meeting
5. Hold consultation meeting
6. Repeat step 5 as needed
7. Come to agreement

Step 1: Prepare Planning Document

- Define areas of potential effect or shared concern
- Determine your installation's objectives
- Keep an open mind about your how your objectives are met
- Consult **before** any decisions have been made

Step 2: Determine Consulting Partners

List tribes potentially having an interest in affected area or situation. How?

- Research prior installation consultations
- Contact known tribes
- Contact state or regional intertribal organizations for information
- Contact local or nearby Tribal Historical Preservation Officers (THPOs)
- Be inclusive

Step 2: Determine Consulting Partners, continued

In the United States there are:

- 335 federally recognized Tribes
- 230 federally recognized Alaska Native entities

= 565 federally recognized tribal and native entities

- Over 300 tribal and native entities which are NOT federally recognized

Step 3: Contact Consulting Partners

- Installation commander formally contacts by letter the head(s) of tribal government(s) to request consultation meeting and includes relevant information about the purpose of the consultation, what agencies will be involved
- If the issue involves NHPA, the commander may request consultation through the THPO, if the tribe(s) has one

Step 4: Arrange Consultation Meeting

After initial letters and follow-up calls:

- Determine if there are barriers to tribal participation, such as timing, funding, and location
- Determine if religious leader(s) need to be included
- Jointly establish meeting format and goals
- Jointly set date, time, place, and agenda of the consultation meeting

Step 5: Hold Consultation Meeting

- Confirm meeting format, facilitator, and issues at start of the meeting
- Discuss, exchange views, and listen
- Encourage meeting participants to get to know each other
- Before concluding, make plans for the next meeting

Step 6: Repeat Step 5 As Needed

- Be prepared to hold several or multiple consultations
- Vary the meeting locations, e.g., at the installation, at the tribal facility, or near the affected site
- Follow the same planning and preparation practices in Steps 1-4

Step 7: Come to Agreement

- Agreement is desirable but not necessary for a successful consultation
- Consultation can be effective even without consensus
- Developing a positive relationship through the consultation process is a critical factor in a successful consultation meeting

Action

- Distribute draft minutes of consultation to all parties
  - Request input, finalize jointly
- Agree to follow-on meetings or assign both staffs to finish products, plan formal signing ceremony
- Implement agreed-upon plans or actions
- Continue to - **Communicate, Coordinate & Document**

Practical Issues

- **Confidentiality**: You don’t need to know everything
- **Reimbursement for “invited” travel**: Can be done for meeting planning, but not for actual consultation
- **Payment for services**: For data, technical information & background, other professional services
- **Food**: Use representational funds to provide food
- **Gifts**: Find a (legal) way to accept them.

Some Final Thoughts on Meetings…

- Be genuine, empathetic, compassionate but strong
- Accept, respect diversity
- Choose a positive approach
  - Learn how to disagree without being disrespectful
  - Utilize a comfortable, non-threatening tone
- Stay calm in the face of anger
  - Forgive and move forward
- Enjoy being there!

Building Relationships

- Informal meetings help develop trust between leaders
- Staff level coordination is essential
- Find other opportunities to work together
- Invite tribal leaders to special events
- Enjoy social time together
- Get pictures or video’s and share with the tribe
- Send a hand written “thank you” with a picture from the commander, to key individuals

Some Things to Remember

- Avoid even the appearance of the past approach of “decide, announce, defend” (DAD)
- Have reasonable expectations
- **Be as flexible as possible** - about deadlines and schedules
- Consultation can be effective without consensus; agreement is desirable, but not necessary

Mutual Benefits of Consultation

- Initial investment of time and money helps ensure mission will not be compromised
- Working in Indian Country can be professionally exciting and personally rewarding

NWO District Commander, Col David C. Press and CRST Chairman Joseph Brings Plenty during the dedication of the tribes Mni Wastewater Intake Ceremony